

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE  
SUBSTANTIAL DEVELOPMENT PERMIT  
ISSUED BY SKAGIT COUNTY TO  
SKAGIT COUNTY PUBLIC WORKS  
DEPARTMENT,

CITIZENS FOR ORDERLY GROWTH

Appellants,

v.

SKAGIT COUNTY AND SKAGIT COUNTY  
PUBLIC WORKS DEPARTMENT,

Respondents,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Third Party.

SHB No. 84-17

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, a request for review of a shoreline substantial development permit granted by Skagit County to Skagit County Public Works Department, came on for hearing before the Shorelines Hearings

1 Board; Lawrence J. Faulk, Chairman, Gayle Rothrock, Nancy Burnett  
2 Rodney M. Kerslake and Beryl Robison, convened at Mt. Vernon,  
3 Washington on October 24 and 25, 1984 and conveyed at Lacey,  
4 Washington on October 31, November 1, and November 28, 1984.  
5 Administrative Appeals Judge, William A. Harrison, presiding.

6 Appellant Citizens for Orderly Growth appeared by its attorneys,  
7 Keith W. Dearborn and Alison Moss. Respondent Skagit County appeared  
8 by John R. Moffat, Chief Civil Deputy Prosecuting Attorney. State of  
9 Washington Department of Ecology appeared by Allan T. Miller, Jr.,  
10 Assistant Attorney General. Reporter Gene Barker provided court  
11 reporting services.

12 Witnesses were sworn and testified. Exhibits were examined. From  
13 testimony heard and exhibits examined, the Shorelines Hearings Board  
14 makes these

#### 15 FINDINGS OF FACT

##### 16 I

17 This matter arises in Skagit County southwest of Burlington.

##### 18 II

19 The Skagit River flows through the area in question. The River is  
20 diked to protect against flooding. Flood control storage also exists  
21 in the mountainous origins of the River at Upper Baker and Ross Dams.

##### 22 III

23 Gages Slough lies north of the Skagit River and somewhat parallel  
24 to it. Historically, the Slough was a sub-channel of the River. In  
25 modern times, the dikes of the River have isolated the Slough from the

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1 River. The waters of the Slough are still or slow-moving in contrast  
2 to waters within the diked channel of the River.

3 IV

4 Presently, a man-made outfall joins the Slough to the River. This  
5 pierces the dike to allow the Slough to drain by gravity into the  
6 River. A flapgate on the mouth of the outfall prevents the River from  
7 flowing into the Slough.

8 V

9 During the heavy rainfalls of winter, the level of the Skagit  
10 River rises above the Slough outfall barring drainage of the Slough.  
11 During these times, the Slough floods adjoining crop lands along its  
12 lower reaches (south of McCorquedale Road).

13 VI

14 In 1978, Skagit County proposed that a pump station be built to  
15 pump mechanically the excess storm water out of Gages Slough and into  
16 the Skagit River through a discharge line passing from the pump  
17 station to the River. This was proposed for financing by local  
18 assessment and failed on that basis.

19 VII

20 In 1982, Skagit County sought the advice of consulting engineers.  
21 Regarding Gages Slough, the engineer's report recommended a two phase  
22 approach: (1) clean the Slough and (2) install the type of pump which  
23

1 the County had proposed in 1978.<sup>1</sup> The phase one cleaning wa.  
2 completed but did not alleviate the flooding.

3 VIII

4 In December, 1983, respondent Skagit County Public Works  
5 Department filed an application with Skagit County for a shoreline  
6 substantial development permit for a pump station to control the  
7 flooding of Gages Slough.

8 IX

9 The proposed pump would automatically turn on when the water level  
10 in Gages Slough is approaching flood level at 20 feet above mean sea  
11 level (M.S.L.). It would continue to run until the level of water in  
12 the Slough subsides to 18 feet M.S.L. At this point, the pump would  
13 automatically shut off.

14 X

15 The bottom elevation of Gages Slough near the proposed pump site  
16 is 15.7 feet M.S.L. Presently, Gages Slough will be drained by the  
17 gravity outfall in summer down to this 15.7 foot M.S.L. The water  
18 level critical to maintenance of fish or wildlife throughout the  
19 Slough in the greater area in question is 14 feet M.S.L.

20  
21  
22  
23 1/ In the long run, the engineer's report also endorsed formation of  
24 a drainage district, apparently of the type which could assess and  
25 regulate and which had been rejected by the public in 1978.

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XI

The reduction of peak water level in the Slough, as proposed, would not lower the level of the Slough below the present minimum nor cause substantial adverse effect upon fish or wildlife. Moreover, the pollution filtration effect of Slough vegetation would be enhanced by the lowering of peak water level in the Slough as proposed.

XII

The discharge line from the proposed pump would enter the "shoreline," as defined in the Shoreline Management Act (SMA) at RCW 90.58.030(2)(d), that being the "wetland" 200 feet from the ordinary high water mark of the Skagit River. This was the theory upon which application was made for a shoreline permit. Respondents contend that Gages Slough itself, where the pump would be located, is not a "shoreline" under the SMA. Appellant contends to the contrary.

XIII

Skagit County prepared an environmental checklist for the proposed pump under the State Environmental Policy Act (SEPA), chapter 43.21C RCW. It then circulated a proposed declaration of non-significance to agencies with jurisdiction including the State Departments of Game, Fisheries, and Ecology. It received no comment and proceeded to issue a final declaration of non-significance.

XIV

The Skagit County Shoreline Master Program (SCSMP) provides:

1. The following components of utilities, essentially shoreline dependent, should be allowed on shorelines, providing they are located to cause

1 no adverse impacts to the shoreline environment and  
2 other uses.

3 a. Water system intake facilities and outfall  
4 pipes.

5 Section 7.18.1B(1) (page 7-120).

6 XV

7 On March 21, 1984, Skagit County granted a shoreline substantial  
8 development permit for the proposed pump. On May 2, 1984, appellant  
9 requested review of the permit by this Board. Department of Ecology  
10 (DOE) was joined.

11 XVI

12 All or nearly all of Gages Slough is beyond the "shoreline" 200  
13 foot strip bordering the Skagit River.

14 XVII

15 The dikes of the Skagit River provide protection from floods up to  
16 the level which would occur once in 14 years on the average ("14 year  
17 flood"). A 14 year flood involves 60% of the water volume of the 100  
18 year flood. The dikes of the Skagit have not been breached since  
19 1951, a period of 34 years.

20 XVIII

21 Were the 100 year flood to occur, the dikes of the Skagit River  
22 would be breached, although at what point is unknown. The resulting  
23 floodwater outside the dikes would inundate large areas of western  
24 Skagit County with slow moving waters known as "sheet-flow." In such  
25 an event, Gages Slough would be too greatly overwhelmed to direct the  
26 course of floodwaters. Rather, the Slough would become an

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1 undistinguished portion of the vast expanse of submerged land under  
2 the sheet-flow of water.

3 XIX

4 Gages Slough, at present, is a marsh or bog. However, its water  
5 level does not rise and fall in unison with the Skagit River.

6 XX

7 The Federal Emergency Management Agency has not designated any  
8 floodway for the Skagit River in the area concerned.

9 XXI

10 Any Conclusion of Law which should be deemed a Finding of Fact is  
11 hereby adopted as such.

12 From these Findings of Fact the Board comes to these

13 CONCLUSIONS OF LAW

14 I

15 We review the proposed development for consistency with the  
16 applicable (Skagit County) Shoreline Master Program and the Shoreline  
17 Management Act (SMA). RCW 90.58.140(2)(b). We also review for  
18 compliance with the State Environmental Policy Act (SEPA), chapter  
19 43.21C RCW. King Co. Chap W.E.C. v. Seattle, SHB No. 11 (1973) and  
20 Coughlin v. Seattle, SHB No. 77-18 (1977).

21 II

22 Appellant, having requested review, bears the burden of proof in  
23 this proceeding. RCW 90.58.140(7).

24 III

25 SEPA. The subject shoreline permit was issued after consideration

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1 of environmental factors. See Sisley v. San Juan County, 89 Wn.2d 78  
2 569 P.2d 712 (1977). Appellant has not shown that the DNS was  
3 materially incorrect. Issuance of the DNS in this matter constituted  
4 procedural compliance with SEPA.

5 IV

6 Extent of Wetlands under the Shoreline Management Act. Appellant  
7 presents a threshold issue as to whether Gages Slough is a "wetland"  
8 as that term is used at RCW 90.58.030(2)(f) of the SMA. We have  
9 previously entered our Order Denying Motion for Summary Judgment dated  
10 July 27, 1984, setting forth our jurisdiction to review this issue and  
11 our reasoning in support thereof. That Order is incorporated herein  
12 by reference. We turn now to the merits of this issue.

13 V

14 This issue is governed by RCW 90.58.030(f) and (g) as implemented  
15 by WAC 173-22-030(2) and WAC 173-22-040(2) (see Appendix for full  
16 text). Although DOE has designated wetlands which do not include  
17 Gages Slough, in the event that any of the wetland designations shown  
18 on the maps conflict with the above criteria, the criteria shall  
19 control. WAC 173-22-055.

20 VI

21 Under the SMA definition of wetland, RCW 90.58.030(f) Gages Slough  
22 must be either (1) a floodway or (2) a marsh, bog, swamp, or river  
23 delta associated with the Skagit River.

24 VII

25 Appellant has failed to show that Gages Slough has flooded with

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reasonable regularity, or that it is identifiable by changes in surface soil conditions or changes in types or quality of vegetative ground cover condition. Moreover, appellant has not shown that Gages Slough and vicinity cannot reasonably be expected to be protected from flood waters by the Skagit River dikes. Appellant has not proven that Gages Slough is a "wetland" by virtue of being a "floodway" as those terms are used in the SMA.

#### VIII

Appellant has proven that Gages Slough is a marsh or bog but not that it is associated with the Skagit River. Appellant has not proven that Gages Slough is a "wetland" by virtue of being an associated marsh or bog as those terms are used in the SMA.

#### IX

Appellant has not proven that Gages Slough is a "wetland" nor a "shoreline of the state" as those terms are used in the SMA. Neither this conclusion nor installation of the proposed pump restricts Skagit County's choices as to the best measures to protect against an extreme flood event.<sup>2</sup>

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2/ Skagit County may even elect to include Gages Slough in the SCSMP under the proviso of RCW 90.58.030(2)(f) allowing optional inclusion of portions of a 100 year flood plain. We merely point out this election to illustrate our conclusion that the County's choices remain unrestricted, and express no opinion as to the advisability of this or any other measure as protection against an extreme flood event.

X

Master Program. Appellant has not proven that the proposed development is inconsistent with the Skagit County Master Program.

XI

Shoreline Management Act. Appellant has not proven that the proposed development would have significant adverse effect upon water quality, soils, groundwater or wildlife. The proposed development has not been shown to be inconsistent with the SMA nor with the substantive requirements of SEPA.

XII

Summary. Appellant has not proven that Gages Slough is a shoreline of the state (wetland) under the SMA, nor that the proposed development would have any significant adverse effect upon the quality of the environment nor that the proposed development is inconsistent with the SCSMP, the SMA, or SEPA. The shoreline substantial development permit should be affirmed.

XIII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

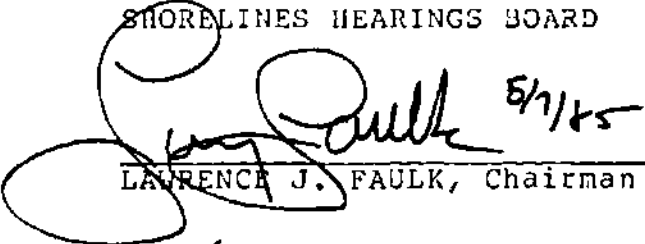
From these Conclusions of Law the Board enters this


ORDER

The shoreline substantial development granted by Skagit County to Skagit County, Public Works Department, is hereby affirmed.

DONE at Lacey, Washington this 10th day of May, 1985.

SHORELINES HEARINGS BOARD

 5/1/85  
LAURENCE J. FAULK, Chairman

  
GAYLE ROTHROCK, Vice Chairman

  
NANCY BURNETT, Member

  
RODNEY M. KERSLAKE, Member

  
BERYL ROBISON, Member

  
WILLIAM A. HARRISON  
Administrative Appeals Judge

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APPENDIX

RCW 90.58.030(2)(f) and (g):

(f) "Wetlands" or "wetland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all marshes, bogs, swamps, and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology: PROVIDED, That any county or city may determine that portion of a one-hundred-year-flood plain to be included in its master program as long as such portion includes, as a minimum, the floodway and the adjacent land extending landward two hundred feet therefrom;

(g) "Floodway" means those portions of the area of a river valley lying streamward from the outer limits of a watercourse upon which flood waters are carried during periods of flooding that occur with reasonable regularity, although not necessarily annually, said floodway being identified, under normal condition, by changes in surface soil conditions or changes in types or quality of vegetative ground cover condition. The floodway shall not include those lands that can reasonably be expected to be protected from flood waters by flood control devices maintained by or maintained under license from the federal government, the state, or a political subdivision of the state.

WAC 173-22-030(2):

(2) "Associated wetlands" means those wetlands or wetland areas which either influence or are influenced by and are in proximity to any stream, river, lake, or tidal water, or combination thereof, subject to chapter 90.58 RCW.

WAC 173-22-040(2):

(2) Riverine flood plains.

1 (a) The wetland area within the flood plains  
2 shall be not less than those lands extending  
3 landward for two hundred feet in all directions as  
4 measured on a horizontal plane from the ordinary  
5 high water mark or floodway pursuant to subsection  
6 (b) below, whichever is greater. The wetland area  
7 shall not be greater than the 100-year flood plain  
8 boundary as established by acceptable methods.

9 (b) Wetland boundaries shall remain as the  
10 100-year flood plain boundary, as defined by  
11 chapter 173-22 WAC, unless local government chooses  
12 to change the wetland boundaries. If the  
13 boundaries are changed, those changes shall be  
14 according to one of the following methods:

15 (i) Appropriate surface soil type boundaries.

16 (ii) Changes in type, quantity or quality of  
17 vegetative ground cover.

18 (iii) Readily identifiable natural barriers or  
19 permanent flood control devices such as levees,  
20 dikes or revetments.

21 (iv) Any reasonable method which meets the  
22 objectives of the shoreline management act.

23 (c) The proposed revision of wetland  
24 boundaries by any of the above methods must be  
25 submitted to the department of ecology for review.  
26 Prior to submittal to the department of ecology, a  
27 decision as to the relative environmental  
significance of the revision shall be made pursuant  
to chapter 197-10 WAC, the SEPA guidelines. If the  
department of ecology is satisfied that the  
proposal conforms to the criteria contained herein,  
the local shoreline master program shall be revised  
to reflect the boundary changes. The department of  
ecology shall amend chapter 173-19 WAC (State  
Master Program) at a reasonable interval following  
amendment of the local shoreline master program.